Asia Commercial Finance (M) Bhd v Leong Choong Shin

HIGH COURT (KUALA LUMPUR) — COMMERCIAL SUIT NO D5-22-235 OF 1995
KAMALANATHAN RATNAM JC
8 JANUARY 1997

Civil Procedure *— Pleadings — Striking out statement of claim — Application to strike out statement of claim under O 18 r 19(1) of the Rules of the High Court 1980 — No evidence shall be admissible under r 19(2) — Affidavit in support rejected — Court to consider statement of claim and presume that matters stated therein were correct — Whether contents of statement of claim established a cause of action — Rules of the High Court 1980 O 18 r 19(1) & (2)*

Civil Procedure *— Pleadings — Striking out statement of claim — Application to strike out statement of claim on the ground that claim disclosed no reasonable cause of action, frivolous and vexatious — Whether claim obviously unsustainable — Rules of the High Court 1980 O 18 r 19(1)*

Limitation *— Accrual of cause of action — Agreement between parties to withhold proceedings — Whether Limitation Act 1953 applicable — Whether application merely procedural in nature — Doctrine of estoppel applicable — Limitation Act 1953 s 6*

Contract *— Void contract — Agreement to withhold proceedings — Whether agreement defeated the law of limitation and thus void — Whether s 29 of the Contracts Act 1950 applicable — Contracts Act 1950 ss 24 & 29*

This was an appeal by the defendant against the senior assistant registrar's dismissal of his application to strike out the plaintiff's claim. The defendant executed two guarantees in consideration of loans granted by the plaintiff to the borrower. The borrower defaulted in making payment of the instalments and subsequently on 11 May 1995, the plaintiff proceeded to enforce the guarantees against the defendant. The defendant applied under O 18 r 19(1) of the Rules of the High Court 1980 to strike out the claim and relied on all three grounds stated in that rule.

In support of his application, the defendant filed an affidavit stating, inter alia, that the plaintiff had no reasonable cause of action against the defendant as the action was statute-barred pursuant to s 6 of the Limitation Act 1953. It was submitted that the time period to commence any legal proceedings had been put in motion on 22 September 1988, ie the date when the plaintiff issued the first letter of demand ('the letter of demand') and that therefore the plaintiff ought to have commenced legal proceedings within six years from the date of the demand being made.

The plaintiff contended that there was an effective agreement between the parties in a letter dated 18 July 1989 ('the letter') that the plaintiff would not call on the guarantee until the 'completion of the ... project ... and the issuance of certificate of fitness for the project'. The plaintiff argued that in view of this new agreement, any cause of action arising out of the issuance of the letter of demand on 22 September 1988 was extinguished by the agreement of the parties.

The defendant contended that any agreement to withhold proceedings did not cause the limitation period to be suspended. Further, it was argued that such an agreement was void pursuant to ss 24 and 29 of the Contracts Act 1950.

Held, dismissing the appeal:

(1) Since the defendant had relied on all three grounds stated in O 18 r 19(1) to strike out the statement of claim, the court was bound to apply the rule least favourable to the plaintiff. Order 18 r 19(2) states that if a party intends to rely under O 18 r 19(1)(a), then no evidence shall be admissible. Therefore, no evidence ought to be accepted in support of the defendant's application and thus the defendant's affidavit in support was rejected. The court would only consider the statement of claim and to presume that the matters stated therein were correct. Looking at the contents of the statement of claim, it was clear that the plaintiff had established a cause of action. On this alone, the appeal ought to be dismissed (see p 22C–D).

(2) In an application to strike out a claim, all the court had to do was to satisfy itself that the claim was on the face of it 'obviously unsustainable'. In this case, the plaintiff had shown that there were issues to be tried and that the application to strike out ought to be dismissed.

By providing the defendant with the letter, the defendant was estopped from reneging on the contents of the letter, from the terms of which he had benefited. On the facts, the conduct of the defendant in filing the application to strike out was unconscionable. Moreover, the application of the Limitation Act in this case was purely procedural and did not strike at essential validity. In the light of the finding that the Limitation Act was merely procedural in nature and did not affect the essential validity, the agreement as contained in the letter was not one that could be said to be forbidden by a law, or that it was of such a nature that, if permitted, it would defeat any law. Further, s 29 of the Contracts Act had no application to this case as it could not be said that the letter 'restricted absolutely' the right of the plaintiff 'from enforcing his rights'.

Furthermore, having in mind the contents of the letter and the arbitrary interpretation each party was calling the court to make of the terms of the letter as to whether the certificate of fitness referred to therein related to a temporary or a final certificate, it was clear that on this issue alone, the application ought to be stuck out (see pp 26D, F–H and 27G–H); *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202 and *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 followed.

[Bahasa Malaysia summary

Ini adalah suatu rayuan daripada defendan terhadap penolakan permohonan untuk membatalkan tuntutan plaintif oleh penolong

A kanan pendaftar. Defendan melaksanakan dua gerenti sebagai balasan kepada pinjaman yang diberikan oleh plaintif kepada peminjam. Peminjam ingkar dalam membuat bayaran ansuran dan kemudiannya pada 11 Mei 1995, plaintif bertindak untuk menguatkuasakan gerenti-gerenti itu terhadap defendan. Defendan memohon di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan tuntutan itu dan bergantung kepada kesemua tiga alasan yang dinyatakan dalam kaedah itu.

Untuk menyokong permohonannya, defendan memfailkan afidavit, menyatakan, antara lain, bahawa plaintif tidak mempunyai kausa tindakan yang munasabah terhadap defendan kerana tindakan itu adalah dihalang oleh statut mengikut s 6 Akta Had Masa 1953. Adalah dihujahkan bahawa tempoh masa untuk memulakan apa-apa prosiding telah bermula pada 22 September 1988, iaitu tarikh apabila plaintif mengeluarkan surat tuntutan yang pertama ('surat tuntutan tersebut') dan dengan itu plaintif sepatutnya telah memulakan prosiding undang-undang dalam masa enam tahun dari tarikh tuntutan dibuat.

Plaintif berhujah bahawa terdapat perjanjian yang berkuatkuasa di antara pihak-pihak dalam sepucuk surat bertarikh 18 Julai 1989 ('surat tersebut') bahawa plaintif tidak akan membuat tuntutan atas gerenti itu sehingga 'penyempurnaan ... projek ... dan pengeluaran sijil layak menduduki bagi projek itu'. Plaintif berhujah bahawa memandangkan perjanjian baru ini, apa-apa kausa tindakan yang timbul daripada pengeluaran surat tuntutan tersebut pada 22 September 1988 telah dipadamkan oleh perjanjian di antara pihak-pihak. Defendan berhujah bahawa apa-apa perjanjian untuk menahan prosiding tidak menyebabkan had masa digantung. Selanjutnya, adalah dihujahkan bahawa perjanjian sedemikian adalah batal mengikut ss 24 dan 29 Akta Kontrak 1950.

Diputuskan, menolak rayuan:

(1) Oleh kerana defendan telah bergantung kepada kesemua tiga alasan yang dinyatakan dalam A 18 k 19(1) untuk membatalkan pernyataan tuntutan, mahkamah adalah terikat untuk mengguna-pakai kaedah yang paling tidak memihak kepada plaintif. Aturan 18 k 19(2) menyatakan bahawa sekiranya sesuatu pihak berniat untuk bergantung kepada A 18 k 19(1)(a), tiada keterangan yang boleh diterima. Oleh itu, tiada keterangan yang boleh diterima untuk menyokong permohonan defendan dan dengan itu afidavit menyokong defendan ditolak. Mahkamah hanya akan menimbangkan pernyataan tuntutan dan membuat anggapan bahawa perkara-perkara yang dinyatakan di dalamnya adalah betul. Melihat kepada kandungan penyataan tuntutan itu, adalah jelas bahawa plaintif telah membuktikan kausa tindakan. Atas alasan ini sahaja, rayuan patut ditolak (lihat ms 22C–D).

(2) Dalam suatu permohonan untuk membatalkan tuntutan, apa yang mahkamah patut buat adalah untuk berpuas hati bahawa tuntutan itu pada asasnya adalah 'dengan jelasnya tidak dapat dipertahankan'. Dalam kes ini, plaintif telah menunjukkan bahawa

terdapat isu-isu untuk dibicarakan dan bahawa permohonan untuk membatalkan patut ditolak.

Dengan memberikan kepada defendan surat tersebut, defendan telah diestop daripada memungkiri kandungan surat tersebut, yang mana beliau telah mendapat manfaat daripada terma-termanya. Atas fakta-fakta, tindakan defendan dalam memfailkan permohonan untuk membatalkan adalah tidak berpatutan. Tambahan lagi, pemakaian Akta Had Masa dalam kes ini hanyalah tentang prosedur semata-mata dan tidak menjejaskan kepentingan kesahan. Berdasarkan pendapat bahawa Akta Had Masa hanyalah bersifat prosedur semata-mata dan tidak menjejaskan kepentingan kesahan, perjanjian seperti yang terkandung dalam surat tersebut bukanlah suatu yang boleh dikatakan dihalang oleh undang-undang, atau bahawa ianya adalah dalam bentuk di mana, jika dibenarkan, akan menggagalkan mana-mana undang-undang. Tambahan pula, s 29 Akta Kontrak tidak terpakai kepada kes ini kerana ianya tidak boleh dikatakan bahawa surat tersebut 'menghalang sepenuhnya' hak plaintif 'daripada menguatkuasakan haknya'.

Selanjutnya, setelah mengambil kira kandungan surat tersebut dan tafsiran arbitrari setiap pihak meminta mahkamah membuat terhadap terma-terma surat tersebut mengenai sama ada sijil kelayakan menduduki yang dirujuk di dalamnya adalah berkaitan dengan sijil sementara atau muktamad, adalah jelas bahawa atas isu ini sahaja, permohonan itu patut dibatalkan (lihat ms 26D, F–H dan 27G–H); *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202 dan *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 diikut.]

Notes

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

For cases on accrual of cause of action, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1740–1742.

For cases on void contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2295–2310.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd [1989] 2 MLJ 202 (folld)

Central Electricity Board v Commissioner of the Federal Capital & Anor [1967] 2 MLJ 161 (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (folld)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (folld)

Legislation referred to

Contracts Act 1950 ss 24, 29

A Limitation Act 1953 s 6
Rules of the High Court 1980 O 18 rr 9 (1)(a), (b) & (c), (2)

Fiona Bodipalar and *Deborah Kaur* (*Sri Ram & Co*) for the appellant/defendant.

B *CW Teo* (*Khaw & Hussein*) for the respondent/plaintiff.

Cur Adv Vult

Kamalanathan Ratnam JC: This is an appeal by the defendant against the learned senior assistant registrar's dismissal of his application to strike C out the plaintiff's claim. The plaintiff's claim is based on two loans of RM400,000 and RM650,000 granted to one Belian Enterprises Sdn Bhd ('the borrower'). The defendant executed two guarantees, both dated 15 June 1985, in consideration of the aforesaid loans. Contending that the borrower defaulted in making payment of the instalments, the plaintiff D proceeded to enforce the guarantees against the defendant for the recovery of monies due and owing. The defendant's application to strike out (encl 7) is reproduced herewith for relevancy:

1 Tuntutan plaintif bertarikh 11 Mei 1995 dibatalkan kerana:

(a) ia tidak mendedahkan apa-apa kausa tindakan atau pembelaan E yang munasabah, mengikut mana-mana yang berkenaan; atau

(b) ia mengaibkan, remeh atau menyusahkan; atau

(c) ia boleh menjejaskan, menghalang atau melengahkan perbicaraan tindakan itu dengan adil.

2 Kos tindakan dan permohonan ditanggung oleh pihak plaintif.

F 3 Lain-lain relief yang mahkamah mulia ini berpendapat wajar.

In support of encl 7, the defendant has filed an affidavit (encl 6).

Preliminary issue

G It is necessary to reproduce O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC') under which provisions the defendant had made this application. Order 18 r 19(1) reads as follows:

19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the H ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; I or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

The defendant has relied on all three grounds to strike out the statement of claim. But O 18 r 19(2) states clearly that if a party intends to rely under r 19(1)(a), then no evidence shall be admissible.

In para 7 of encl 6, the defendant states:

> (7) I am advised and verily believe that the plaintiff has no reasonable cause of action against the defendant named herein as the action is commenced after the limitation period has expired and further the plaintiff's claim is scandalous, frivolous, vexatious and an abuse of the process of this honourable court as it is a desperate attempt to cause a fresh accrual of the cause of action.

Since the plaintiff has chosen to go under all three of the sub-rules, I ought to and indeed am bound to apply the rule least favourable to the plaintiff. I will therefore hold that no evidence ought to be acceptable in support of the defendant's application and I would reject the defendant's affidavit in support. I am then compelled by authority to only consider the statement of claim and to presume that the matters stated therein are correct. Looking at the contents of the statement of claim, I am more than satisfied that the plaintiff has established a cause of action. On this alone, I ought to dismiss this appeal.

As to whether the filing of affidavits in reply by the plaintiff could constitute a waiver, I hold that the mandatory provision of O 18 r 19(2) cannot be ignored and any affidavit in reply must face the same act of rejection by the court, as was meted out to the defendant's affidavit.

However, and in the event I am wrong, I shall consider the defendant's submission.

Whether the plaintiff's action is statute-barred

It was the submission of the defendant that the plaintiff's claim was statute-barred pursuant to s 6 of the Limitation Act 1953. I was referred to the guarantees dated 15 June 1985 which stated that payment was to be made on demand. I was then referred to a letter dated 22 September 1988 from the plaintiff's previous solicitors and addressed to the borrower with copies extended to the guarantor. The defendant contended that this was a demand made to the guarantor. On this basis, the defendant contended that the time period to commence any legal proceedings had been put into motion as of 22 September 1988 and that therefore the plaintiff ought to have commenced legal proceedings within six years from the date of the demand being made. I was referred to cl 15 of both the guarantees which stipulated, inter alia, that upon demand, payment was to be made within 14 days thereafter. In the circumstances and since the 14-day period would have allowed the date of commencement of the limitation period as 7 October 1988, the plaintiff ought to have filed this action before 6 October 1994. Any proceedings commenced after 6 October 1994 is therefore statute-barred.

It was pointed out to me that the plaintiff's second notice of demand dated 18 April 1995 and addressed to the defendant was invalid as it was an attempt to revive the limitation period which had already expired.

In reply, the plaintiff conceded that the cause of action originally accrued on 7 October 1988, that is, upon the expiry of the 14-day period

A from the date of the first letter of demand dated 22 September 1988. However, the plaintiff relied on a letter dated 18 July 1989 from the plaintiff to the defendant which is reproduced in full:

18 July 1989 WITHOUT PREJUDICE

B Mr Leong Cheong Shin
c/o Lot 4350, Mukim of Ampang
Jalan 3, Kampong Baru
68000 Ampang
Selangor

C Dear Sir

(A) Kumpulan Bertiga Development Sdn Bhd
(1) Fixed loan of RM1.25m
(2) Syndicated Bridging Loan of RM3.2m

(B) Belian Enterprise Sdn Bhd
D (1) Fixed loan of RM650,000
(2) Fixed loan of RM400,000
(3) Fixed loan of RM910,000

(C) Quake Choong Fatt Sdn Bhd
(1) Fixed loan of RM350,000
(2) Fixed loan of RM950,000

E We are pleased to advise that our company is agreeable to your request to withhold all legal proceedings (foreclosure and civil) as regard to all the above loans, until the completion of the 'Sunrise Park' project in Ampang New Village and the issuance of certificate of fitness for the project.

F Yours faithfully
ASIA COMMERCIAL FINANCE (M) BHD

Sgd
OH TEIK TEONG
Senior Manager
G Loans Supervision Department
cc The Manager, Bukit Bintang Branch
Azam Malek & Soh
NK Tan & Associates

Based on this letter, the plaintiff argued that there was an effective agreement between the parties that the plaintiff would not call on the guarantee until
H the 'completion of the "Sunrise Park" project in Ampang New Village and the issuance of certificate of fitness for the project'. In the circumstances, it was the contention of the plaintiff that the plaintiff had indeed given him an extension of time and therefore the limitation period ought not to run against the plaintiff as from 7 October 1988. The plaintiff argued that in
I view of this new agreement, any cause of action arising out of the issuance of the first letter of demand was extinguished by the agreement of the parties and that the plaintiff could only enforce the guarantees against the defendant only upon the fulfilment of the conditions set forth in the new agreement and after issuing a fresh demand on the defendant. The plaintiff therefore submitted that the cause of action for these proceedings did not accrue on 7 October 1988 but commenced from the date the second letter of demand was sent.

In the event that the court held that the cause of action of these proceedings accrued on 7 October 1988, then the plaintiff contended that it could rely on the said new agreement as an answer to the plea of limitation.

The defendant's answer to this new agreement was that any agreement to withhold proceedings did not cause the limitation period to be suspended. Further, such an agreement was void pursuant to ss 24 and 29 of the Contracts Act 1950.

Section 24 reads:

> 24 The consideration or object of an agreement is lawful, unless —
> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Based on this, it was submitted that the plaintiff's agreement with the defendant to withhold proceedings caused the aforesaid agreement to defeat the law of limitation and as such the agreement was unlawful and thus void. Relying on *Central Electricity Board v Commissioner of the Federal Capital & Anor* [1967] 2 MLJ 161, it was submitted that the court had no inherent jurisdiction to extend time except where such power was expressly given to it under a provision of the law.

Section 29 of the Contracts Act 1950 reads:

> 29 Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

It was submitted that based on s 29, limiting the time period within which proceedings should be commenced is void. The defendant further submitted that in spite of its letter dated 18 July 1989 whereby the plaintiff was agreeable to withholding all legal proceedings (foreclosure and civil) as regard to all the loans stated in that said letter, yet the plaintiff had commenced foreclosure proceedings (Originating Summons Nos S5–24–294–89 and S5–24–297–89). It was thus submitted that the plaintiff's letter dated 18 July 1989 besides being unable in law to postpone and/or extend the limitation period, was also of no effect as there was evidence that the plaintiff had proceeded with foreclosure proceedings.

Having read the submissions of the parties and the cases cited in support, it is my view that in an application to strike out a claim, all I have to do is to satisfy myself that the claim is on the face of it 'obviously unsustainable' (see *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 (FC)).

I am more than satisfied that the plaintiff has shown that there are issues to be tried and that this application to strike out ought to be dismissed. On the question that the Limitation Act would apply, I can do

A no better than repeat the words of Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 wherein his Lordship held that one can estop oneself out of the Limitation Act by conduct. He said at p 244:

> In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ
B 49, a decision of the Privy Council from the Federal Court of Malaysia, in a case of moneylenders, their Lordships said:
>
> ' ... there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not absolutely prohibitory and so do not preclude estoppels. One example of this is the Statute of Frauds (see *Humphries v Humphries* [1910] 2 KB 531 (CA) in which it
C was no doubt considered that ... the statute ought to be treated as regulating procedure, not as striking at essential validity) ... a more direct test to apply ... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that
D the parties may have created by their conduct or otherwise.'
>
> These words are widely drawn and suggest that the Limitation Act can give way to estoppel. Indeed, there are dicta in *Turberville v West Ham Corp* [1950] 2 KB 208 which suggest that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the
E period have induced the plaintiff to delay proceedings.

Based on this reasoning, the learned judge held that the Limitation Act 1953 was purely procedural. In line with this thinking, Gopal Sri Ram JCA said in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 at pp 155–156:

> F There is an alternative ground upon which the High Court could have held limitation not to apply in this case, although I do not decide this appeal upon it because it was neither raised nor argued. It has to do with the final clause in the document whereby the appellants agreed that the respondents may enforce the 'guarantee' *at any time.*
>
> Now, that appears to me to be a promise for value by which the
G appellants bound themselves not to raise limitation as a defence to an action brought to enforce the contract. In such circumstances, it seems quite plain that the appellants ought not to be permitted to go back on their word. It would be quite unjust and inequitable to permit them to do so. Had the point been taken, there would have been no difficulty in holding that the appellants ought to be estopped from pleading the statute. The doctrine of
H estoppel — whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter — has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred*
I *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp 244–245. A reading of his Lordship's judgment in that case has left me with the impression that little or nothing may be usefully added to the learning contained therein.
>
> Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation. Its content was explained

by Mohd Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words: A

> 'It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see Spry on *Equitable Remedies* (2nd Ed) at p 236).'

The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953. B C

Guided by these two cases, I find that by providing the defendant with the letter dated 18 July 1989, the defendant is estopped from reneging on the contents of the letter, from the terms of which he had benefited. The D plaintiff had commenced an action against, inter alia, the present defendant on 10 June 1993 at the Kuala Lumpur High Court under Suit No D3–22–603–93 ('the D3 suit') pursuant to the guarantees. The plaintiff obtained judgment but the same was set aside upon an application made by the defendant who said in the supporting affidavit (exh GLP-1 to encl 8) as E follows:

> I have a good defence to this action which action is premature as the plaintiff has agreed in writing not to proceed against me until the completion of the 'Sunrise Park' project in Ampang New Village, which project was to be financed by the plaintiff.

F

In view of this defence that was raised, the plaintiff discontinued the D3 suit. The conduct of the defendant in filing this application to strike out is unconscionable. In fact, I hold that the application of the Limitation Act in this case is purely procedural and does not strike at essential validity. With regard to the defendant's reliance on s 24 of the Contracts Act 1950 that the agreement as contained in the letter dated 18 July 1989 is void, I G hold that in the light of my finding that the Limitation Act is merely procedural in nature and does not affect the essential validity, such an agreement is not one that can be said to be forbidden by a law, or that it is of such a nature that, if permitted, it would defeat any law. I also find that s 29 of the Contracts Act has no application to this case. By no stretch H of the imagination can it be said that the said letter dated 18 July 1989 'restricted absolutely' the right of the plaintiff 'from enforcing his rights'. Looking at the second limb of s 29, again there was no limit as to the time within which the plaintiff might enforce its rights. In fact, the parties agreed to suspend all legal proceedings until the completion of the 'Sunrise Park' project and the issuance of the certificate of fitness. Now, it is I common knowledge that the certificate of fitness is to be issued by the relevant authorities and that there is no limit to their time as to when they would issue the said certificate of fitness. This non-restriction as to time is what Gopal Sri Ram JCA referred to in *Sia Siew Hong* as 'a promise for value by which the appellants bound themselves not to raise limitation as

A a defence to an action brought to enforce the contract'. In the case of *Central Electricity Board* relied upon by the defendant, the court there was dealing with an application for extension of time to refer the matter to arbitration when there was no express provision in the contract or the Arbitration Ordinance under which an order for such extension of time could be made.

B

The question then arises as to whether the letter dated 18 July 1989 had the effect of either suspending or extending the period of limitation or whether it had the effect of extinguishing the effect of the first letter of demand and that the cause of action arose only when the second notice of demand was sent. I do not think it is necessary for this court at this stage to decide on that issue. Suffice it to say that this application in my view is unmeritorious.

C

Is the action premature

The next argument raised by the defendant in this appeal is that the action is premature. The defendant relied on the letter dated 18 July 1989 and submitted that since the final certificate of fitness has not been issued, the action is premature as the plaintiff is in breach of the agreement to withhold all legal proceedings until the issuance of the certificate of fitness. There was exhibited in the plaintiff's affidavit a temporary certificate of fitness from 31 March 1994 to 30 September 1994. Although the plaintiff had applied for renewal of the temporary certificate of fitness, it was submitted that there was no final certificate of fitness issued to date.

D

E

The plaintiff denied that its action is premature. It referred me to exhibit GLP-9 which was the certificate of practical completion signed by the architect and dated 11 June 1993 and the temporary certificate of fitness issued by the Majlis Perbandaran Ampang Jaya dated 26 April 1994 which was before this writ was issued. The plaintiff contended that as long as a certificate of fitness has been issued for the 'Sunrise Park' whether temporary or final, the condition in the agreement dated 18 July 1989 has been fulfilled.

F

G This court is of the view, and having in mind the contents of the letter dated 18 July 1989 and the arbitrary interpretation each party is calling this court to make of the terms of the said letter as to whether the certificate of fitness referred to therein relates to a temporary or a final certificate, that on this issue alone, this court ought to strike out this application. Again, I am of the view that it is not my province to decide on the nature of the certificate of fitness intended by the letter dated 18 July 1989. That is a matter for the trial judge to conclude. In the circumstances, I had no hesitation in dismissing this appeal with costs.

H

Appeal dismissed.

I

Reported by Keith Kwan